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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT DEWAYNE PORTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0607-CR-584
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE TIPPECANOE CIRCUIT COURT  
The Honorable Donald L. Daniel, Judge  
Cause No. 79C01-0602-FC-6

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**April 23, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Robert D. Porter appeals his conviction in a bench trial and sentence for possession of a handgun with obliterated identification marks, a class C felony;<sup>1</sup> carrying a handgun without a license, a class A misdemeanor;<sup>2</sup> and possession of a controlled substance, as a class D felony.<sup>3</sup>

We reverse and remand with instructions.

## ISSUE

Whether the trial court erred in admitting evidence.

## FACTS

In the evening of February 5, 2006, Terry Bowsman, a driver for City Cab in Lafayette, picked up a customer, later identified as Porter. During the cab ride, Porter asked Bowsman whether he “had a joint” and whether Bowsman “did any pills[.]” (Tr. 15). Porter then offered Bowsman pills in lieu of money for the fare. Bowsman declined Porter’s offer and dropped off Porter at “Jake’s,” a “tavern in Chauncey Hill mall.” (Tr. 16).

Approximately one hour later, Bowsman received a call to pick up Porter at “Harry’s,” a tavern “almost just around the corner” from Jake’s. (Tr. 16). Dispatch informed Bowsman that Porter wanted to go to “BW3<sup>[4]</sup> on the Levee.” (Tr. 16). After Bowsman picked up Porter, Porter asked Bowsman whether guns scared him, to which

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<sup>1</sup> Ind. Code §§ 35-47-2-18; 35-47-2-23(b).

<sup>2</sup> I.C. §§ 35-47-2-1; 35-47-2-23(c).

<sup>3</sup> I.C. § 35-48-4-7.

<sup>4</sup> Buffalo Wild Wings Grill & Bar is referred to as “BW3.”

Bowsman replied, “no.” (Tr. 17). Porter then “pulled out [a] pistol from his waist [band,] . . . saying that he had a permit to carry it,” and “had a silencer for it.” (Tr. 17, 19). The gun “was in a holster.” Porter, who was sitting in the front passenger seat, initially “had [the pistol] on his lap,” but later “put it up on the dash.” (Tr. 17). Upon their arrival at BW3, Porter tucked the gun back in his waistband, paid his fare, exited the cab and went inside BW3.

After Bowsman dropped off Porter, Bowsman telephoned the police. According to a transcript of Bowsman’s call to 911, Bowsman informed the operator that Porter “pulled out a 9 millimeter . . . still in the case,” and that Porter had “said that he had a silencer on it . . . .” (App. 62). Bowsman described Porter as being in his late twenties and wearing a black Nike hat and black, red and gray coat. Bowsman also told the operator that Porter had gone inside BW3. The 911-operator advised West Lafayette Police Officers David Smith and Michael Brewer that Bowsman had dropped off “a younger male late 20’s . . . wearing a black red and gray coat with a black Nike hat” at BW3 and that the man had a “9 millimeter handgun . . . still in the case or holster when he pulled it out and stuck it in his waistband.” (App. 65-66). The 911-operator did not advise the officers that Bowsman had said that Porter told him he had a silencer for the gun.

Initially, Officers Smith and Brewer could not locate Porter because approximately two hundred people were in BW3, watching the Super Bowl. After dispatch repeated the description of Porter, Officers Smith and Brewer observed Porter sitting at the bar. The officers did not have any reason to suspect that Porter was engaged

in criminal activity “at that time” and had not seen Porter engage in criminal activity. (Tr. 52).

The officers “approached [Porter] practically one from each side to . . . not alert him that [they] were coming up behind him.” (Tr. 35). The officers then “placed hands on his arms as to control his hand movements at the same time” to prevent Porter from reaching for a weapon. (Tr. 35). Officer Smith instructed Porter not to move and asked Porter whether he had a handgun on his person. Porter replied that he did not. The officers then walked Porter out of BW3, “placed him against . . . [a] cement pillar”; “controlled [Porter’s] hands”; and “conducted a[n] exterior pat down for [o]fficer safety.” (Tr. 38).

During the pat down, Officer Smith felt a hard object, which he “immediately recognized . . . as a butt of a gun and a nylon holster.” (Tr. 40). Officer Smith gave the gun to Officer Brewer, who secured it in his police vehicle. Officer Smith handcuffed Porter and placed him in his police vehicle. After securing the gun, Officer Brewer went back into the restaurant to retrieve Porter’s wallet, which he had left on the bar. Officer Brewer went through the wallet’s contents, attempting to locate an identification card and permit to carry a concealed weapon.

Officer Smith transported Porter to Tippecanoe County Jail, where he discovered that Porter lacked a license to carry a handgun and that the gun’s serial number had been obliterated. As part of the booking process, Officer Smith went through Porter’s wallet, where he discovered a tablet. Laboratory tests later identified the tablet as Clonazepam, a controlled substance.

On February 6, 2006, the State charged Porter with Count I, possession of a handgun with obliterated identification marks; Count II, carrying a handgun without a license; and Count III, possession of a controlled substance. On March 14, 2006, Porter filed a motion to suppress as evidence “all items seized during an investigatory stop and pat down search . . . .” (App. 11). Porter argued that “[t]he police did not have reasonable suspicion that [he] was involved in criminal activity to make an investigatory stop,” and that “[t]he police did not have reason to believe that their safety or that of others was endangered to conduct a pat down search of [Porter].” (App. 11). Following a hearing, the trial court denied Porter’s motion to suppress. On May 17, 2006, Porter filed a second motion to suppress, seeking to suppress “items seized during the search of his wallet . . . .” (App. 37). Porter argued that “[t]he seizure and search were outside of the scope of the area within [Porter]’s immediate control at the time of his arrest,” and that “[t]here existed no exigent circumstances which excused proceeding without a warrant.” (App. 37). The trial court denied the motion to suppress on May 22, 2006.

The trial court held a bench trial on May 31, 2006, during which Porter objected to the admission of the gun and the Clonazepam tablet into evidence. The trial court found Porter guilty of all counts. Following a sentencing hearing on June 30, 2006, the trial court found that aggravating circumstances outweighed mitigating circumstances and sentenced Porter to seven and a half years on Count I; one year on Count II, to run concurrently with Count I; and two years on Count III, to run consecutively with Counts I and II. The trial court suspended three and a half years.

## DECISION

Porter asserts the trial court erred in admitting the gun and Clonazepam tablet into evidence. Specifically, Porter asserts that Officers Smith and Brewer lacked reasonable suspicion to detain him and conduct the subsequent search of both his person and wallet.

The State concedes this issue, noting that “[i]n Indiana, a citizen may carry a handgun in public as long as he has a license for the weapon” pursuant to Indiana Code section 35-47-2-2, and that the officers had no reason to believe that Porter had committed a crime where “there was no indication that he did not have a license for the gun, that it had obliterated identification marks, or that he had pointed it at anyone[.]” State’s Br. 6, 7. We accept the State’s concession. Accordingly, we reverse and remand with instructions to vacate Porter’s convictions and the respective sentences.

Reversed and remanded.

BAKER, C.J., and ROBB, J., concur.